In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-729

THE STOUFFER CORPORATION, D/B/A STOUFFER'S CINCINNATI INN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner challenges the court of appeals' dismissal of its petition to review the decision of the National Labor Relations Board in a representation proceeding.

The Union[1] filed a petition with the National Labor Relations Board, seeking a representation election among certain employees of the Cincinnati S. I. Company ("CSI"). The employees all worked at a hotel known as Stouffer's Cincinnati Inn. Pursuant to license and lease agreements between CSI and petitioner, CSI operated the

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[1]Hotel, Motel, Restaurant Employees and Bartenders Union, Local 12 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

Inn and petitioner conducted the food and beverage operations. The Union asked the Board to certify a unit that did not include any of the workers employed by petitioner. CSI and petitioner argued that they were joint employers of all workers at the Inn, and that the only appropriate unit was one including all workers in the entire hotel complex (Pet. App. A-2 to A-4).[2]

Following a hearing, the Board issued a Decision and Direction of Election (Pet. App. A-1 to A-17). The Board found that CSI and petitioner were not joint employers at the Inn and that the unit sought by the Union was appropriate. The Board ordered an election (Pet. App. A-9, A-16 to A-17). The Union won and was certified as the employees' bargaining agent; the Union entered into collective bargaining with CSI (Pet. App. A-22 to A-23).

Petitioner, claiming to be aggrieved by a "final" Board order, asked the court of appeals to review the Board's Decision and Direction of Election. Petitioner maintained that the court of appeals had jurisdiction under Section 10(f) of the National Labor Relations Act, 61 Stat. 148, as amended, 29 U.S.C. 160(f), and under Section 10 of the Administrative Procedure Act, 5 U.S.C. 702 (Pet. App. A-24 to A-26). The court of appeals declined to review the Board's order, relying on "the longstanding rule that [Board] certification proceedings cannot be reviewed in a Court of Appeals" (Pet. App. A-81).

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[2]Petitioner was not an original party to the proceeding, because the Union petitioned for an election in a unit that, it contended, included only workers employed by CSI. The Board's hearing officer permitted petitioner to intervene "for the purpose of assuring the Regional Director that all possible parties to this hearing will be present and represented throughout the course of this hearing" (Tr. 31).

Petitioner argues (Pet. 19) that "[t]he statutory scheme of review (29 U.S.C. §§ 159(d), 10(e), 10(f)) evidences a clear-cut congressional purpose to assure judicial review to parties adversely affected by Board certification proceeding orders, once 'final'." But Section 10(f) of the National Labor Relations Act, which provides that "[a]ny person aggrieved by a final order of the Board" may petition for review of that order in the appropriate court of appeals, does not confer jurisdiction on the court of appeals to review a decision by the Board that a representation election should be held or a union certified as a bargaining representative. The Board's decisions do not become "final" for purposes of review until they culminate in an unfair labor practice order, such as an order to give back pay or a bargaining order.

Section 9(d) of the Act, 29 U.S.C. 159(d), provides that the Board's decisions in representation disputes may be reviewed in a court of appeals only after they have led to an unfair labor practice charge, and the final disposition of that charge is before the court of appeals for review. *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 308 U.S. 413; *National Labor Relations Board* v. *Falk Corp.,* 308 U.S. 453, 459. See also *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476-477. The representation determination here did not lead to an unfair labor practice order, and there was, therefore, nothing the court of appeals had jurisdiction to review.[3]

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[3]Contrary to petitioner's suggestion (Pet. 10), Section 10 of the Administrative Procedure Act does not confer an independent grant of jurisdiction on a court. See *Califano* v. *Sanders,* 430 U.S. 99, 106-107.

Petitioner contends (Pet. 14-17) that an exception to the general rule should be created because the acquiesence of CSI in the Board's representation determination makes it unlikely that there will be unfair labor practice charges. The Court already has rejected a similar argument. In *American Federation of Labor, supra*, the Board certified a CIO affiliate as the representative of a coast-wide unit of longshoremen, rejecting the contention of an AFL affiliate that there should have been separate employer units. The AFL affiliate, like petitioner, had no means of triggering an unfair labor practice proceeding. It sought direct review in the court of appeals of the Board's representation determination, and argued that the "failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected" (308 U.S. at 411). This Court held that "these are arguments to be addressed to Congress and not the courts." *Id.* at 411-412.

The only difference between that case and this one is that here multiple employers are involved, while there multiple unions were involved. It is a distinction without a difference.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JANUARY 1978.

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